RECORD AND BRIEFS

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No. 16-____

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required express authorization from Congress before active-duty military officers may hold a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

After President Obama nominated and the Senate confirmed Colonel Martin T. Mitchell as a judge of the Article I U.S. Court of Military Commission Review (CMCR), Judge Mitchell continued to serve on the U.S. Air Force Court of Criminal Appeals (AFCCA). The U.S. Court of Appeals for the Armed Forces (CAAF) rejected as moot Petitioner's challenge to Judge Mitchell's continued service on the AFCCA, because his CMCR commission had not been signed until after the AFCCA decided her case on the merits—even though she moved for reconsideration after the commission was signed.

The Questions Presented are:

1. Whether the Court of Appeals erred in holding that Petitioner's claims were moot.
2. Whether Judge Mitchell's service on the CMCR disqualified him from continuing to serve on the AFCCA under 10 U.S.C. § 973(b)(2)(A)(ii).
3. Whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

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PETITION FOR A WRIT OF CERTIORARI

Air Force Second Lieutenant Nicole A. Dalmazzi respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted in the Appendix at Pet. App. 1a. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is reprinted in the Appendix at Pet. App. 10a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on August 18, 2016, *United States* v. *Dalmazzi*, 75 M.J. 434 (C.A.A.F. 2016) (mem.), and issued a final decision on December 15, 2016. This Court therefore has jurisdiction under 28 U.S.C. § 1259(3).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

> shall nominate, and by and with the advice and consent of the Senate, shall

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1. After it granted review, received plenary briefs, and heard oral argument, the Court of Appeals issued a decision at the end of which it vacated the grant and purported to deny Lieutenant Dalmazzi's petition. Pet. App. 7a. But this Court has appellate jurisdiction over all "[c]ases in which [CAAF] granted a petition for review under section 867(a)(3) of title 10." The Court of Appeals' grant of review brings this case within the plain meaning of that provision.

> appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. CONST. art. II, § 2, cl. 2.

As relevant here, the military dual-officeholding statute provides that:

> Except as otherwise authorized by law, an officer to whom this subsection applies [including "a regular officer of an armed force on the active-duty list"] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate.

10 U.S.C. § 973(b)(2)(A)(ii).

STATEMENT OF THE CASE

A. Legal Background

Since shortly after the Civil War, Congress has generally prohibited active-duty military officers from holding a second non-military position within the Executive Branch. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319.[2] Although subsequent

2. The ban has been extended in some cases, including to require waiting periods before former officers can hold particular

measures have carved out a handful of express exceptions to this dual-officeholding ban, the general prohibition remains in force. *See* 10 U.S.C. § 973(b).

More than an antiquated technical provision, the dual-officeholding ban is designed "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also Memorandum for the General Counsel, Gen. Servs. Admin.*, 3 OP. O.L.C. 148, 150 (Apr. 10, 1979) ("That section embodies an important policy designed to maintain civilian control of the Government.").

Among other things, the current version of § 973(b) makes it unlawful for an active-duty military officer to "hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate," except where such service is "otherwise authorized by law." 10 U.S.C. § 973(b)(2)(A)(ii). Thus, as relevant here, the dual-officeholding ban applies to all "civil offices" held either by principal Executive Branch officers, *see Myers* v. *United States*, 272 U.S. 52 (1926), or by inferior officers whose appointment has not properly been vested in some other body. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring presidential nomination and Senate advice and consent for inferior officers the

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civilian positions, such as Secretary of Defense, 10 U.S.C. § 113(a), or to require that particular positions be held by civilians. *E.g.*, *id.* § 942(b)(1) (providing that CAAF judges "shall be appointed from civilian life by the President, by and with the advice and consent of the Senate").

appointment of whom Congress has not vested "in the President alone, in the courts of law, or in the heads of departments").

The dual-officeholding claim in this case arises from the unique structure of the U.S. Court of Military Commission Review (CMCR). That court was created by Congress in 2006 (and substantially reformed in 2009) to serve as an intermediate appellate court between military commissions convened under the Military Commissions Act (MCA), 10 U.S.C. §§ 948a–950t, and the U.S. Court of Appeals for the District of Columbia Circuit. *Id.* § 950f.

In the MCA, Congress provided two different mechanisms for staffing the CMCR with judges. First, the Secretary of Defense was empowered to "*assign* persons who are appellate military judges to be judges on the Court." *Id.* § 950f(b)(2) (emphasis added). This apparently refers to judges already serving on the service-branch-specific Courts of Criminal Appeals (CCAs) within the court-martial system. *See id.* § 866(a) (referring to "appellate military judges").

CCA judges are inferior Executive Branch officers for purposes of the Appointments Clause, *Edmond* v. *United States*, 520 U.S. 651 (1996), and may thus be "assigned" to the CCAs if they are already inferior Executive Branch officers, rather than "appointed" thereto. *See Weiss* v. *United States*, 510 U.S. 163 (1994). But because the CMCR, unlike the CCAs, is not subject to appellate (or other) supervision within the Executive Branch, CMCR judges are almost certainly principal Executive Branch officers, for reasons the D.C. Circuit detailed (while reserving a ruling) in *In re Al-Nashiri*, 791 F.3d 71, 82–85 (D.C. Cir. 2015).

CMCR judges therefore hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," 10 U.S.C. § 973(b)(2)(A)(ii), a conclusion the Executive Branch seems to share. Thus, in direct response to the D.C. Circuit's ruling in *Al-Nashiri* (and after initially having been "assigned" to the CMCR in 2014), Judge Mitchell was "appointed" to the court using the MCA's second staffing mechanism. *See* 10 U.S.C. § 950f(b)(3). That provision authorizes the President to "*appoint*, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* (emphasis added). Every judge to join the CMCR since the D.C. Circuit's ruling in *Al-Nashiri* has similarly been "appointed" to that court.[3]

CMCR judges also hold a "civil office." The political branches have long embraced "a very liberal interpretation of the phrase 'civil office,'" *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884), as a generic term originally meant simply to exempt an officer's subsequent promotion (and concomitant re-appointment *as* a military officer). Thus, if a civilian can hold the position, then it is a "civil office" for purposes of § 973(b)(2)(A)(ii). *See id.* § 950f(b)(3) (authorizing appointments of civilian judges to the CMCR); *see also* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall

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3. Even if CMCR judges are inferior officers, the appointment of active-duty military officers to such positions still triggers § 973(b)(2)(A)(ii) because *appointments* to the CMCR (unlike *assignments* to it) may only be made by the President "by and with the advice and consent of the Senate." *Id.* § 950f(b)(3); *accord id.* § 973(b)(2)(A)(ii).

have been created, or the emoluments whereof shall have been increased during such time . . . .").

Indeed, the breadth of the term "civil office" is exactly *why* Congress in 1983 added three narrowing conditions to § 973(b)—including the pertinent requirement here, *i.e.*, that the second position require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii); *see also Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 9–10 (Aug. 2, 2016) (describing the motivation and purpose of the 1983 amendments to § 973(b)).

Any doubt that CMCR judges hold a "civil office" is conclusively settled by the 2009 amendments to the MCA, which reconstituted that body as an Article I "court of record." 10 U.S.C. § 950f(a); *see also In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). As in *Freytag* v. *C.I.R.*, 501 U.S. 868 (1991), "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," *id.* at 888, the judges of which hold a quintessential "civil office." *See, e.g.*, *Winchell* v. *United States*, 28 Ct. Cl. 30, 35 (1892).

Nor is military officers' service as judges on the CMCR "otherwise authorized by law." Congress added that language in 1956 to reflect that "other laws enacted after the date of enactment of [5 U.S.C. § 5534a] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). What these other laws all have in common is clear and unambiguous indicia of Congress's intent to override the dual-

officeholding ban. *See, e.g.*, *id.* § 528 (expressly allowing appointment of certain military officers to positions within the CIA or the Office of the Director of National Intelligence). *See generally* Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 MIL. L. REV. 21, 85 (1958) (collecting examples).

In contrast, the MCA says nothing whatsoever about appointing military officers, as such, to serve in a "civil office" as CMCR judges. Indeed, the only language in § 950f that even appears to reference military officers is the authority provided to the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [CMCR]." 10 U.S.C. § 950f(b)(2) (emphasis added). Neither the text nor history of this provision does not provide the clear statement required to satisfy § 973(b).

With regard to the text, the term "appellate military judges" includes civilians. *See id.* § 866(a) ("Appellate military judges who are assigned to a [CCA] may be commissioned officers or civilians"). And even if Congress nevertheless meant to refer only to military officers, given the well-settled and constitutionally significant difference between the words "assign" and "appoint" in this context, the fact that § 950f(b)(2) refers to the former "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss*, 510 U.S. at 172 (emphasis added).

This understanding is confirmed by the history of § 950f(b)(2), which was first codified by the 2006 MCA—under which the CMCR was not a court of record. If Congress did not express any intent to

override § 973(b) when it created the CMCR in 2006, such an intent cannot be inferred simply from the reenactment of the same language as part of the 2009 overhaul of the MCA.

Despite these understandings, three of the five judges currently appointed to the CMCR also serve as active-duty military officers (and, indeed, active judges of the Army Court of Criminal Appeals), regularly hearing cases on both courts. This Petition raises the legality and constitutionality of this novel arrangement.

B. Procedural History

Petitioner, a Second Lieutenant in the Air Force, entered a guilty plea before a general court-martial to wrongfully using ecstasy in violation of Article 112 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912. She was sentenced to a dismissal and one month of confinement. Because her sentence included a dismissal, the Judge Advocate General referred the case to the Air Force Court of Criminal Appeals (AFCCA), *see id.* § 866(b)(1), before which Petitioner argued that the charge should have been dismissed due to unlawful command influence. She also objected to the severity of the sentence.

On May 12, 2016,[4] a three-judge panel that included Judge Mitchell rejected Petitioner's appeal. Judge Mitchell had also been serving on the CMCR since October 28, 2014, when he was "assigned" thereto under 10 U.S.C. § 950f(b)(2). But after the D.C. Circuit in *Al-Nashiri* called into question the constitutionality of such an "assignment," he was

4. For ease of reference, a chronology of the key events is provided in the Appendix. *See* Pet. App. 28a.

nominated by President Obama under 10 U.S.C. § 950f(b)(3) to an "appointment" as an "additional judge" on the CMCR. 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (nomination of Colonel Mitchell to be CMCR judge "under 10 U.S.C. Section 950f(b)(3)"). The Senate confirmed him on April 28, 2016. *Id.* S2600 (daily ed. Apr. 28, 2016) (reporting confirmation).

Because of the dual-officeholding ban, Judge Mitchell's service on the CMCR should have immediately terminated his military status, thereby disqualifying him from hearing Lieutenant Dalmazzi's case. She pressed this argument in a motion for reconsideration filed with her AFCCA panel (including Judge Mitchell) on May 27, 2016, and again in the petition for review that the Court of Appeals for the Armed Forces granted. Pet. App. 3a.[5]

After full briefing and oral argument on the merits of Petitioner's challenge, the Court of Appeals issued an opinion holding that her objection was moot because President Obama did not formally sign Judge Mitchell's CMCR commission until May 25, 2016—13 days after the AFCCA decision in her case. *See* Pet.

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5. The Court of Appeals treats the 60-day time limit within which to file a petition for review, *see* 10 U.S.C. § 867(b), as jurisdictional. *United States* v. *Rodriguez*, 67 M.J. 110, 116 (C.A.A.F. 2009); *see also id.* at 116 n.10 (explaining why CAAF's approach differs from civilian criminal appeals). After waiting over six weeks for the AFCCA to rule on her motion for reconsideration, Petitioner petitioned for review by the Court of Appeals on July 11, 2016, in order to satisfy § 867(b). The AFCCA subsequently concluded that that CAAF petition deprived it of jurisdiction over her motion for reconsideration, which it dismissed on July 18, 2016. *See* Pet. App. 8a (citing *United States* v. *Riley*, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003)).

App. 7a ("As Colonel Mitchell had not yet been appointed a judge of the USCMCR at the time the judgment in Appellant's case was released, the case is moot as to these issues.").

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Misapplied the Wrong Doctrine in Rejecting Petitioner's Appeal

The Court of Appeals rejected Petitioner's appeal on mootness grounds, based upon a factually and legally indefensible application of the wrong doctrine. "As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted). Petitioner, whose sentence includes a dismissal from the Air Force, unquestionably has such an interest in pursuing the disqualification of Judge Mitchell from the AFCCA panel that upheld that punishment. Her appeal was emphatically not moot.

In our view, the Court of Appeals' concerns more properly sound in *standing* to challenge Judge Mitchell's participation, *i.e.*, whether Petitioner could claim a concrete injury arising from his service on the CMCR. *See, e.g.*, *Pashaian* v. *Eccelston Props., Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996) (discussing standing to seek a judge's disqualification). But even viewed through the proper doctrinal lens, the Court of Appeals' analysis failed to account for the dispositive facts of Petitioner's case or the plain text of the dual-officeholding ban.

On the facts, even if § 973(b)(2)(A)(ii) was not triggered until President Obama signed Judge Mitchell's CMCR commission on May 25, 2016,

Petitioner's motion for reconsideration before the AFCCA panel—which specifically challenged Judge Mitchell's role in her case—was filed two days later on May 27, and remained pending before the AFCCA for over six weeks before it was dismissed. *See ante* at 9 & n.5. Thus, even on the Court of Appeals' view, Judge Mitchell was still participating in Petitioner's case *after* President Obama signed his commission—by which point, if not sooner, he formally held his office as a CMCR judge.

On the law, the dual-officeholding ban applies to military officers who "hold" *or* "exercise the functions" of a civil office. *See* 10 U.S.C. § 973(b)(2)(A)(ii). Whether or not Judge Mitchell formally "held" the position of CMCR judge before President Obama signed his commission, there is no question that he "exercise[d] the functions" of that position at the same time he sat on Petitioner's AFCCA panel.

For example, on May 2, 2016 (10 days before deciding Petitioner's AFCCA appeal), Judge Mitchell took the oath of office as an "Appellate Judge" of the CMCR. Later that day, he joined in an order in a pending case. *See* Pet. App. 26a. And on May 18—still one week before President Obama signed his commission—Judge Mitchell participated in the CMCR's decision in *United States* v. *Al-Nashiri*, a decision that, more than a little ironically, rejected the argument that his appointment to the CMCR violated the dual-officeholding ban. *See* Pet. App. 18a.[6] Thus,

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6. In *Al-Nashiri*, the CMCR concluded, albeit summarily, that its judges do not hold a "civil office" under § 973(b) because they exercise a "classic military function." Pet. App. 24a. This *ipse dixit* failed to grapple with the liberal interpretation all three branches have long given to the term "civil office"; the presence of civilian CMCR judges (including one of the judges on

at the same time that he joined in an AFCCA decision rejecting Petitioner's appeal, Judge Mitchell was unquestionably "exercis[ing] the duties" of a CMCR judge in violation of 10 U.S.C. § 973(b)(2)(A)(ii).

II. The Court of Appeals' Error Warrants Reversal—and Its Massive (and Growing) Impact Warrants Plenary Review

The Court of Appeals' mootness analysis is much more than an isolated flaw calling for simple error correction. Already, the Court of Appeals has applied its decision in Petitioner's case to dismiss petitions for review it had granted in at least six additional appeals from CCAs raising dual-officeholding challenges. *See United States* v. *Cox*, No. 16-635 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *Miller*, No. 16-641 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *Craig*, No. 16-650 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *O'Shaughnessy*, No. 16-616 (C.A.A.F. Dec. 27, 2016) (mem.); *United States* v. *Morchinek*, No. 16-617 (C.A.A.F. Dec. 27, 2016) (mem.); *United States* v. *Lewis*, No. 16-660 (C.A.A.F. Dec. 27, 2016) (mem.).

As the growing list of additional cases suggests, there is no reason to believe the Court of Appeals will abandon the approach it mistakenly adopted in Petitioner's case. *See Tory* v. *Cochran*, 544 U.S. 734, 739–40 (2005) (Thomas, J., dissenting). In addition, that error has not only infected these additional cases; it has prevented the Court of Appeals from resolving

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the *Nashiri* panel); or the CMCR's status as an Article I "court of record." 10 U.S.C. § 950f(a). *See ante* at 5–6.

It is also telling that, even though the President had not yet signed Judge Mitchell's CMCR commission, it was not argued in *Al-Nashiri* (and the CMCR did not itself suggest) that, as CAAF held in this case, the § 973(b) claim was unavailable.

the merits of the dual-officeholding question. *See, e.g.*, *Anderson* v. *Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting). At the very least, then, this Court should summarily reverse and remand in order to afford the Court of Appeals an opportunity to reach and resolve the merits of Petitioner's challenge to Judge Mitchell's involvement in the AFCCA's review of her case.

And yet, although such a disposition would ordinarily be sufficient, this Petition is not ordinary; plenary briefing and argument are instead warranted on all three of the Questions Presented:

1. Well over 100 cases are already pending in the lower military courts raising the dual-officeholding questions presented here.[7] Moreover, because of the continuing service of three CMCR judges on the Army CCA, that number is growing by the day. The sooner Petitioner's dual-officeholding claim can be conclusively resolved, the easier it will be to sort out the consequences of such a ruling on cases currently pending in the Army CCA, the Court of Appeals, and the CMCR.

2. Even if the statutory dual-officeholding claim is resolved *against* the Petitioner, such a result would only provoke a host of difficult constitutional

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7. The Court of Appeals' current docket itself reflects over 80 pending cases raising the dual-officeholding question. *See* U.S. Court of Appeals for the Armed Forces, New Grants and Summary Dispositions (last updated Jan. 26, 2017), http://www.armfor.uscourts.gov/newcaaf/grants_disp.htm. As of the date of this filing, Counsel for the Petitioner are also aware of 21 additional petitions for review pending in the Court of Appeals that present dual-officeholding objections to decisions by the Army CCA. That number is growing by the day.

questions arising from the simultaneous service of an active-duty military officer on a CCA and the CMCR.

One problem with such simultaneous service arises from the Appointments Clause of Article II, since a CMCR judge who is also serving on one of the CCAs would be a principal officer (and Article I judge) serving alongside inferior (Article II) officers of equal authority. *Cf. Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting statutes to prohibit Article III and Article IV federal judges from serving on same court of appeals panel); *id.* at 83 n.17 (suggesting that allowing such mixed panels would "call into serious question the integrity as well as the public reputation of judicial proceedings").

Moreover, in his capacity as a CCA judge, such a principal officer would be subject, contrary to the Appointments Clause, to the direct supervisory authority of another principal officer, *i.e.*, the Judge Advocate General of the relevant service branch. *See Edmond*, 520 U.S. at 664 (discussing the JAG's authority over CCA judges). *But see Myers*, 272 U.S. at 126–28 (holding that principal officers must be subject to the direct and plenary control of the President).

A second problem arises from the Commander-in-Chief Clause of Article II—since CMCR judges appointed under 10 U.S.C. § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. As such, CMCR judges "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office," *i.e.*, they have "good-cause tenure." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 493 (2010).

Such a constraint on the President's power over active-duty military officers raises constitutional concerns of the first order. *E.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]"). Indeed, it is well settled that it would be unconstitutional for Congress to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1103–04 (2008). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from serving as CMCR judges, then the good-cause removal protection provided by 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.[8]

These constitutional considerations matter in two different but equally important respects: First, they provide yet further support for Petitioner's statutory claim—that the dual-officeholding ban forbids active-duty military officers from serving as CMCR judges. Indeed, the strength of the Appointments Clause and Commander-in-Chief Clause objections should necessarily resolve any ambiguity in § 973(b)(2)(A)(ii) in favor of *prohibiting* active-duty military officers

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8. The Questions Presented do not include the Commander-in-Chief Clause claim because Petitioner has no standing to object to Judge Mitchell's service on the CMCR, as such. But the very real possibility that such service might violate the Commander-in-Chief Clause both bolsters her statutory argument and underscores the need for this Court, rather than the Court of Appeals (which has no authority over the CMCR), to settle the matter.

from serving as CMCR judges. Put another way, if Petitioner is correct that Judge Mitchell's service on the CMCR triggered the dual-officeholding ban (thereby terminating him from the military and disqualifying him from the Petitioner's AFCCA panel *nunc pro tunc*),[9] Petitioner's constitutional objections disappear.

Second, these constitutional questions also suggest that, until the statutory challenge is conclusively resolved, there will continue to be panels of both the CCAs and the CMCR that are exercising authority not just in potential violation of 10 U.S.C. § 973(b)(2)(A)(ii), but in violation of two different provisions of Article II as well.[10] Even if the Court of Appeals in this (or another) case is able to resolve the merits of Petitioner's dual-officeholding challenge, such a holding would not affect the CMCR's prior rejection of such a claim in *Al-Nashiri*—which may not be subject to further appellate review anytime soon.[11]

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9. Civilians may serve on the CCAs, 10 U.S.C. § 866(a), but they must be appointed by the President and confirmed by the Senate. *See United States* v. *Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014). Judge Mitchell was not so appointed.

10. Nor can decisions by such unlawfully constituted panels be salvaged by application of the *de facto* officer doctrine. This Court specifically rejected application of that doctrine to a claim that civilians were unconstitutionally serving on predecessors to the CCAs in *Ryder* v. *United States*, 515 U.S. 177 (1995). And CAAF has held that the *de facto* officer doctrine is inapplicable where, as here, a defendant timely challenges a judge's legal authority to sit on a CCA panel. *United States* v. *Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015).

11. Although the D.C. Circuit has appellate jurisdiction over the CMCR, that jurisdiction only allows it to entertain appeals from "a final judgment rendered by a military commission (as

3. Finally, the ultimate remedy for a violation of the dual-officeholding ban—the officer's immediate termination from the military—is beyond the Court of Appeals' power to direct. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 535 & n.7 (1999). Of course, that fact poses no obstacle to Petitioner's ability to obtain from the Court of Appeals the specific relief she seeks—Judge Mitchell's disqualification from her AFCCA panel. But it does underscore, more broadly, the extent to which only this Court can conclusively resolve the plethora of thorny but persistent questions raised by the appointment of active-duty military officers as CMCR judges.[12]

* * *

As the Chief Justice explained for a unanimous Court in *Munaf* v. *Geren*, even when straightforward resolution of a threshold procedural issue may settle the lower courts' error, "There are occasions . . . when

---

approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR])." 10 U.S.C. § 950g(a); *see Khadr* v. *United States*, 528 F.3d 1112 (D.C. Cir. 2008). Thus, the CMCR's rejection of the dual-officeholding challenge in *Al-Nashiri*, *see ante* at 11 & n.5, is effectively unreviewable by the D.C. Circuit until after the CMCR has ruled on Nashiri's (or another affected defendant's) post-conviction appeal—which may not be for many years. *See In re Al-Nashiri*, 835 F.3d 110, 134 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-___ (U.S. Jan. __, 2017).

12. In addition to the questions raised by the service of active-duty military officers as CMCR judges, the D.C. Circuit has also flagged "a serious issue" involving *civilian* CMCR judges, at least some of whom have continued to engage in the private practice of law without express statutory authorization to do so, despite the clear ban on such conduct in 18 U.S.C. § 203(a). *See Khadr*, 823 F.3d at 99–100.

it is appropriate to proceed further and address the merits. This is one of them." 553 U.S. 674, 691 (2008).

The same is true here.

Because of the posture in which this case reaches the Court, the more-than-100 pending cases that now turn on the resolution of Petitioner's dual-officeholding challenge, the significance of the constitutional questions that challenge implicates, and the difficulties the lower courts will have in conclusively settling the matter without this Court's intervention, certiorari is imperative.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

February 1, 2017

No. 16-___

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES, Appellee
v.

Nicole A. DALMAZZI, Second Lieutenant
U.S. Air Force, Appellant

No. 16-0651

Crim. App. No. 38808

United States Court of Appeals for the Armed Forces

Argued December 7, 2016

Decided December 15, 2016

Military Judge: L. Martin Powell

For Appellant: *Major Johnathan D. Legg* (argued), *Brian L. Mizer,* Esq. (on brief); *Major Thomas A. Smith.*

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce,* Esq. (on brief).

Amici Curiae for Appellee: *Colonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, Major Anne C. Hsieh, Captain Carling M. Dunham, and Captain Samuel E. Landes* (on brief)—for Army Government Appellate Division. *Colonel Valerie C. Danyluk,* USMC, *Lieutenant Commander Justin C. Henderson,* JAGC, USN, *Lieutenant James M. Belforti,* JAGC,

USN, and *Brian K. Keller*, Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Brigadier General John G. Baker*, USMC, *Captain Brent G. Filbert*, JAGC, USN, and *Philip Sundel*, Esq. (on brief)—for Military Commissions Defense Organization.

PER CURIAM:

The issues presented are whether a military officer is statutorily or constitutionally prohibited from simultaneously serving as an appellate military judge on a service court of criminal appeals and as a judge on the United States Court of Military Commission Review (USCMCR). As the appellate military judge who participated in deciding Appellant's case had not yet been appointed a USCMCR judge, we hold that the case is moot as to these issues.

I. Procedural History

A military judge sitting alone convicted Appellant, in accordance with her pleas, of wrongfully using ecstasy, a Schedule I, controlled substance. The convening authority approved the adjudged sentence: a dismissal and confinement for one month. The United States Air Force Court of Criminal Appeals (CCA) affirmed the approved findings and sentence. *United States v. Dalmazzi*, ACM No. 38808, 2016 CCA LEXIS 307, at *7–8, 2016 WL 3193181, at *3 (A.F. Ct. Crim. App. May 12, 2016).

On May 27, 2016, Appellant moved the CCA to vacate its decision because of the participation of USCMCR Judge Martin T. Mitchell on the panel. On July 11, 2016, before the CCA ruled on this motion, Appellant filed a petition for grant of review at this Court. *United States v. Dalmazzi*, 75 M.J. 399 (C.A.A.F. 2016). As a result, the CCA dismissed the motion to vacate for lack of jurisdiction.

II. BACKGROUND

In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the

CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges by ... re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate

Military Judge of the United States Court of Military Commission Review."

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's court-martial. The CCA's opinion was issued on May 12, 2016, ten days after Colonel Mitchell took the oath of office as a USCMCR appellate judge but two weeks before the President signed his commission.

Appellant asserts that: (1) as a USCMCR judge, Colonel Mitchell was prohibited by 10 U.S.C. § 973(b)(2)(A)(ii) from sitting on the CCA; and (2) his service on both the USCMCR and the CCA violated the Appointments Clause of the Constitution.

III. Discussion

The Appointments Clause of the Constitution provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of

> such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. Thus, three separate actions are required for the President to appoint an "additional judge" to the USCMCR under the terms of 10 U.S.C. § 950f: (1) the President nominates a person for the position and sends his name to the Senate for confirmation; (2) the Senate confirms the nominee; and (3) the President appoints the confirmed nominee to the position. Normally, the President signs a commission as evidence of the appointment. But

> if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156 (1803). While not necessary for the appointment, the commission is "conclusive evidence of it." *Id.* at 157. Before the issuance of the commission, the President is free to change his mind and not make the appointment; afterwards, he is not. *See Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004).

Appellant argues that actions Colonel Mitchell took as a judge on the USCMCR before the President issued the commission were public acts that evidenced his appointment. We disagree. It is the President who must perform some public act that evinces the appointment, not the purported appointee. *See, e.g., Dysart*, 369 F.3d at 1306, 1312. Other than the commission, issued on May 25, 2016, there is no evidence that the President appointed Colonel Mitchell to the USCMCR. Therefore, that is the date of his presidential appointment as judge to the USCMCR.

As Colonel Mitchell had not yet been appointed a judge of the USCMCR at the time the judgment in Appellant's case was released, the case is moot as to these issues.

IV. DECISION

The order of August 18, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI
United States Air Force

ACM 38808

ORDER

Panel No. 3

On 12 May 2016, this Court issued an opinion affirming the findings and sentence in Appellant's case. *United States v. Dalmazzi*, ACM 32708 (A.F. Ct. Crim. App. 12 May 2016) (unpub. op.). Appellant filed a motion to vacate this opinion on 27 May 2016. The United States filed its motion in opposition on 22 June 2016.

Appellant has since filed a petition for grant of review of her case with the United States Court of Appeals for the Armed Forces. *United States v. Dalmazzi*, __ M.J. __, No. 16-0651/AF (Daily Journal 11 July 2016). Given the petition, this Court no longer possesses jurisdiction over Appellant's case. *See*

United States v. Riley, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003).

Accordingly, it is by the Court on this 18th day of July, 2016,

ORDERED:

That Appellant's Motion to Vacate is DISMISSED.

[SEAL] FOR THE COURT

LAQUITTA J. SMITH
APPELLATE PARALEGAL SPECIALIST

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI
United States Air Force

ACM 38808

12 May 2016

Sentence adjudged 21 January 2015 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dismissal and confinement for 1 month.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Lieutenant Colonel Roberto Ramirez and Gerald R. Bruce, Esquire.

Before
MITCHELL, DUBRISKE, and BROWN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

DUBRISKE, Judge:

Appellant, in accordance with her plea, was found guilty of wrongfully using ecstasy, a Schedule I controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A second charge and specification, alleging Appellant obstructed the investigation into her drug use by repeatedly dyeing her hair in an effort to avoid forensic detection, was dismissed after acceptance of her plea pursuant to a pretrial agreement.

Appellant was sentenced by a military judge sitting alone to a dismissal and one month of confinement. The general court-martial convening authority approved the sentence as adjudged.

On appeal, Appellant raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). First, Appellant alleges the military judge erred in not dismissing the charges against her due to unlawful command influence. Second, Appellant argues her sentence is inappropriately severe. Finding no error, we affirm the findings and sentence.

Background

In January 2014, the Air Force Office of Special Investigations (AFOSI) opened drug investigations against a small number of commissioned officers, including Appellant, who were stationed at six different Air Force installations. AFOSI investigators, during the course of analyzing cell phones seized during these investigations, also discovered some of these same officers had improperly disclosed proficiency testing materials for officers operating intercontinental ballistic missile systems.

The subsequent command-directed investigation of the test compromise allegations identified almost 100 potential suspects, including Appellant. The test compromise investigation drew significant media attention, and resulted in press conferences and statements from senior leaders within both the Department of Defense and the Department of the Air Force. These statements and press conferences were almost exclusively focused on the test compromise investigation and, eventually, the disciplinary results and corrective actions stemming from the investigation. While the original drug investigations were mentioned during some senior leader statements as the reason the test compromise allegations were discovered, only generic details about the actual investigations were ever released. One senior leader, when specifically asked about the drug allegations, declined to discuss any details as the criminal investigations were ongoing.

Disciplinary action on the test compromise allegations was eventually handled by the numbered air force commander with authority over the involved officers. There was insufficient evidence to support disciplinary action against Appellant for compromising proficiency testing materials.

Appellant was eventually charged with using ecstasy on "divers" occasions and impeding the AFOSI investigation against her. After charges against her were referred to general court-marital, the basic details regarding her trial proceedings were released to the public.

Unlawful Command Influence

On appeal, Appellant claims the military judge erred in denying her motion to dismiss all charges due to unlawful command influence. Appellant, adopting her arguments at trial, primarily alleges the disciplinary fallout from the much publicized test compromise investigation, which resulted in Appellant's chain of command being relieved of their leadership positions, pressured Appellant's current chain of command to bring criminal charges against her due to fear they would likewise lose their command positions if they failed to hold Appellant accountable.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in

reaching the findings or sentence in any case . . . ." The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94–95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)).

We review allegations of unlawful command influence de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). "On appeal, the accused bears the initial burden of raising unlawful command influence. Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." *Id.* (citing *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999)). The initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Appellant must initially present "some evidence" of unlawful command influence. *Id.* (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).

After an issue of unlawful command influence is raised by some evidence, the burden shifts to the Government to rebut an allegation by persuading the court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful com-

mand influence will not affect the findings or sentence. *Biagase*, 50 M.J. at 151. "Where, as here, the issue is litigated on the record at trial, the military judge's findings of fact are reviewed under a clearly erroneous standard, but the question of command influence flowing from those facts is a question of law that this court reviews de novo." *United States v. Jeter*, 74 M.J. 772, 778 (A.F. Ct. Crim App. 2015), *pet. rev. denied*, 75 M.J. 63 (C.A.A.F. 2015).

As an initial matter, we adopt the military judge's findings of fact as they are supported by the record. Upon our independent review of the question of law, we likewise find Appellant failed to meet her initial burden of showing the pretrial publicity and disciplinary response for the test compromise investigation constituted actual or apparent unlawful command influence as it related to the charges in her case. The record clearly establishes the senior leader and command involvement cited by Appellant was focused almost exclusively on matters unrelated to Appellant's case. As such, the argument her command's decision to move forward on drug charges was somehow influenced by a fear of being relieved of command is speculative at best. In so holding, we would note the decision to court-martial a commissioned officer accused of repeatedly using illegal narcotics, instead of imposing some form of administrative action, is not an anomaly within the military justice system.

Moreover, as noted by the military judge, Appellant's theory that her chain of command was unduly concerned about the consequences of disciplinary inaction was rebuffed by the fact that action was not taken against her for compromising testing materials. Commanders fearful they would meet the same fate as their predecessors should have driven them to hold Appellant accountable for all possible disciplinary violations. Appellant's speculative claim is therefore insufficient in our opinion to shift the burden of proof to the Government on this issue.

Assuming, arguendo, that Appellant produced some evidence that unlawful command influence had the potential to impact the trial proceedings, we find beyond a reasonable doubt that this judge alone case was not impacted by actual or apparent unlawful command influence. An objective, disinterested member of the public, fully informed of all facts and circumstances, would not harbor a significant doubt as to the fairness of Appellant's trial. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

Sentence Appropriateness

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct.

Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

After giving individualized consideration to this particular Appellant, her relatively brief record of service, the nature and seriousness of the offense, and all other matters contained in the record of trial, we decline to grant Appellant the relief she requests before this court. The approved sentence for Appellant's repeated use of an illegal drug is not unduly harsh or otherwise inappropriate in our opinion.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and the sentence are AFFIRMED.

[SEAL] FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

LIFTING STAY
AFFIRMING PRIOR ORDERS
DENYING DISQUALIFICATION AND RECUSAL MOTIONS
SETTING ORAL ARGUMENT

CMCR CASE NO. 14-001

May 18, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and

did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee' s mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri*, 791 F .3d 71 (D .C. Cir. 2015); Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presiden-

tial nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri,* 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016, 2 and they were sworn as USCMCR judges on May 2, 2016.[2]

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant's motion for leave to file an outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel,

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[1] *See* 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

[2] U.S. Cong., Nominations of 114th Cong., PN 1219, https://www.congress.gov/nomination/114th-congress/1219 (Judge Mitchell), and PN 1224, https://www.congress.gov/nomination/114thcongress/1224 (Judge King). (Encl. I, 2)

alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion, and we approved the extension request.

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis

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[3] The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the "Air Force nomination of Martin T. Mitchell, to be colonel"

for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra*.

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military

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and "Navy nomination to Donald C. King, to be Captain." It mirrors the closing phrase of PN 1219 and 1224.

judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions

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[4] Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non–military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is GRANTED.

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is GRANTED.

ORDERED that orders our Court previously decided are AFFIRMED.

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is DENIED.

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is DENIED.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

CMCR CASE NO. 14-001

May 2, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On June 26, 2015, appellant filed an unopposed motion moving "the Court to stay the proceedings while it explores options for re-nomination and reconfirmation of the military judges as U.S.C.M.C.R. judges." Appellant explained that the stay sought is for all litigation on the two government appeals filed with our Court. Appellee did not object to the suspension of proceedings.

By a series of orders, our Court ordered the continued suspension of the hearing schedule and oral argument. The President nominated, and on March 14, 2016, the Senate confirmed Judges Mitchell and King. On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders and decisions. On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion.

Therefore, it is hereby

ORDERED that the suspension of the briefing schedule and oral argument is continued in this case. Appellee's motion to delay responding to appellant's April 29, 2016 motion until May 16, 2016 is GRANTED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

Copy to:
Convening Authority, OMC
Judges Listed
Appellate Counsel

CHRONOLOGY

Oct. 28, 2014	Col. Martin T. Mitchell "assigned" to Court of Military Commission Review (CMCR) under § 950f(b)(2)
Jan. 21, 2015	Sentence adjudged by General Court-Martial in Petitioner's case
June 23, 2015	D.C. Circuit decides *Al-Nashiri*; encourages President and Senate to take steps to "put to rest any Appointments Clause questions regarding the CMCR's military judges." 791 F.3d at 86
Mar. 14, 2016	President Obama nominates Col. Mitchell to the position of "additional judge" on the CMCR under § 950(f)(b)(3)
Apr. 28, 2016	Senate confirms Judge Mitchell's appointment to CMCR as "additional judge" under § 950(f)(b)(3)
May 2, 2016	Judge Mitchell takes oath of office as CMCR judge and participates in procedural ruling in *Al-Nashiri*
May 12, 2016	Petitioner's conviction and sentence affirmed by three-judge AFCCA panel that includes Judge Mitchell
May 18, 2016	In decision joined by Judge Mitchell, CMCR rejects § 973(b) challenge to his CMCR appointment
May 25, 2016	President Obama signs Judge Mitchell's CMCR commission

May 27, 2016	Petitioner moves AFCCA for reconsideration on ground that Judge Mitchell's CMCR appointment terminated his military service (and thereby disqualified him from sitting on AFCCA)
July 11, 2016	Petitioner files petition for review at CAAF
July 18, 2016	AFCCA dismisses Petitioner's motion for reconsideration for lack of jurisdiction